

# Judicial Comparativism and Legal Positivism

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JUDICIAL COMPARATIVISM AND LEGAL POSITIVISM

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**Abstract:** The article explores the relationship between the use of foreign law in courts and legal positivism. The point of departure is Jeremy Waldron's notion that foreign consensus is our law; such law exists outside of a legal system, depends on its moral merits and hence brings some of the central positivist commitments into question. The article maintains that even if foreign consensus were our law, this would not undermine legal positivism, and – moreover – that foreign consensus is actually not our law. In so doing, it advances an account of foreign law as a facultative theoretical authority that is best explained by the positivist idea of judicial law-making.

I. Introduction

Legal positivism frequently faces two criticisms. The first arises in transnational law.<sup>1</sup> Positivism – it is argued – has no account of law that crosses borders of a municipal legal system, for its conceptual apparatus cannot make sense of such law as law.<sup>2</sup> Contemporary versions of this longstanding concern claim that positivism is unable to explain the globalized legal world, where

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<sup>1</sup> I use 'transnational' law to refer to all legal phenomena that transcend borders of national legal systems.

<sup>2</sup> The objection has recently been re-articulated by Ronald Dworkin: '[...] we should notice why many people did doubt, half a century ago, that there was any such thing as international law. This was not because the rules and practices were very different from what they are now, but because a certain philosophical theory of what law is, called "legal positivism," was more popular'. 'A New Philosophy for International Law' (2013) 41 *Philosophy & Public Affairs* 2, 3. The claim that positivism denies legal character to international law is often supported by the following remark of HLA Hart: 'there is no basic rule providing general criteria of validity for the rules of international law, and the rules which are in fact operative constitute not a system but a set of rules'. *The Concept of Law* (Clarendon Press, 2<sup>nd</sup> edition 1994) 236. Hart, however, neither thought that rules of international law were non-legal, nor that it was impossible for a rule of recognition to emerge in international law. See more in David Lefkowitz, 'The Sources of International Law: Some Philosophical Reflections' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010) 187, 196–203.

transnational legal interactions become ever more frequent.<sup>3</sup> The motivating argument for such objections assumes that positivism attaches the concept of law to that of a national legal system, which in turn is not the best framework to understand transnational legal phenomena.<sup>4</sup> The second source of uneasiness about positivism appears in constitutional law. The main reason is this: constitutional courts in some legal systems determine the validity of legal rules on the basis of a rhetoric that is more moral than legal. If this is the case – it is believed – positivism’s explanatory potential wanes, because moral merits figure among the existence conditions of legal rules; hence positivism should either be eschewed, or amended to account for the intuition that judiciary is somehow legally required to perform this task.<sup>5</sup>

If these two areas of discomfort merged, we could expect something comparable to a ‘perfect storm’ for positivism. At a first glance, judicial reliance on foreign precedents and legislation qualifies as such a challenge. By using foreign legal materials in controversial constitutional matters, courts combine both elements that positivism purportedly cannot explain: transnational legal interactions and constitutional review. Consider an example. In *Roper v Simmons*, the US Supreme Court held unconstitutional the infliction of capital punishment for crimes committed when the offender was less than 18 years of age. Justice Kennedy relied on foreign law to reach the decision and explained: ‘It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty ... The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our

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<sup>3</sup> See generally: William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, 2009); Detlef von Daniels, *The Concept of Law from a Transnational Perspective* (Ashgate, 2010); Keith Culver, Michael Giudice, *Legality’s Borders: An Essay in General Jurisprudence* (Oxford University Press, 2010). For such challenges in the context of EU law see: Matthias Kumm, ‘The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty’ (2005) 11 *European Law Journal* 262; Pavlos Eleftheriadis, ‘Pluralism and Integrity’ (2010) 23 *Ratio Juris* 365.

<sup>4</sup> For the concept of a legal system in transnational setting, see Julie Dickson, ‘Towards a Theory of European Union Legal Systems’ in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press, 2012) 26.

<sup>5</sup> Most famously, Ronald Dworkin focused on controversial constitutional cases to prove positivism wrong. See his: *Taking Rights Seriously* (Harvard University Press, 1978) and *Law’s Empire* (Fontana Press, 1986). For the view that bills of rights pose a threat to the explanatory potential of exclusive legal positivism, see Wil Waluchow, *Inclusive Legal Positivism* (Clarendon Press, 1994) ch 5.

own conclusions.’<sup>6</sup> On the one hand, no one legislated this ‘opinion’ for the American people: foreign law is neither explicable in terms of sovereign’s commands to its subjects, nor has an obvious institutional pedigree. On the other hand, foreign law enters American legal system on different terms than domestic legal rules: it does not operate along the binary measure of legal validity, but has ‘overwhelming weight’ which is ‘acknowledged’ and not ‘controlling’. So here is the puzzle: foreign law is legislated, but not for us; it matters, but not in an all-or-nothing fashion.

A similar line of thought has led Jeremy Waldron to question the adequacy of positivism as a general theory of law.<sup>7</sup> His doubts stem from the view that the consensus in foreign law amounts to the law in the world; however, such law is not a part of any legal system and its force depends on its merits, hence Waldron is uncertain whether positivist ‘impoverished jurisprudence’ can accommodate this insight.<sup>8</sup> This raises many interesting questions, and calls for a better understanding of both positivism and the use of foreign law in courts. In this article I ask whether the use of foreign law by courts undermines legal positivism, and in so doing, I aim to offer an account of the place of foreign law in legal reasoning.

The structure of the article is as follows. Part II situates, identifies and clarifies parts of Jeremy Waldron’s account of the use of foreign law that merit further discussion from a positivist

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<sup>6</sup> *Roper v Simmons* (2005) 543 US 551, 578.

<sup>7</sup> Jeremy Waldron, *Partly Laws Common to All Mankind: Foreign Law in American Courts* (Yale University Press, 2012) 16–7, 19, 54, 62. Vicki C Jackson similarly claims: ‘Some forms of resistance [to the use of foreign law in courts] might be supported by those versions of positivism that associate law with the product of an authorized, and specifically national, lawmaker’. *Constitutional Engagement in a Transnational Era* (Oxford University Press, Oxford, 2010) 30.

<sup>8</sup> ‘Impoverished jurisprudence’ is how Waldron characterizes strands of positivism based on Joseph Raz’s conception of preemptive authority. Waldron (n 7) 62. For Raz’s conception of authority, see *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press, 1995) ch 10. Waldron’s position towards positivism is ambiguous. Despite many remarks against positivism (eg that ‘positivism is certainly on the defensive’, Waldron (n 7) 54), Waldron admits to have changed his mind since he first wrote about the topic and claimed that ‘positivism’s general credentials are suspect today’ (Jeremy Waldron, ‘Foreign Law and the Modern *Ius Gentium*’ 2005 119 *Harvard Law Review* 129, 142). He now corrects this view: ‘I do not say what I said in 2005, that positivism *as such* has been discredited’ (Waldron (n 7) 54), and implicitly changes his target to include only Austinian sovereignty-based positivism (*Ibid.*, 52–55). He also concedes that ‘[t]here is no particular reason, therefore, that modern positivism, defined in terms of the tools and methodology of Hart’s jurisprudence, should preclude the idea of *ius gentium*, defined as positive law’ (*Ibid.*, 55). It is not clear what one should make of this. On the one hand, Waldron makes several claims against dated versions of positivism, and there is value in investigating what could be a modern positivist response. On the other, some of his arguments could count against positivism even as it stands today. I shall thus try to show that Hartian positivism can account for the use of foreign law by courts, and at least complete the task that Waldron did not finish; this argument will, however, undermine some aspects of Waldron’s theory.

perspective; the goal is not to engage with his theory comprehensively, but to locate the main themes which challenge legal positivism. Part III analyses the use of foreign law against the background of central positivist commitments and attempts to demonstrate that they are not undermined even if we accept the assumption that foreign consensus is our law. As I shall argue, foreign consensus takes up a role of theoretical authority in legal reasoning, and its weight does not depend directly on its merits but is mediated through a social source. Part IV contends that foreign consensus is actually not our law. I will propose that the use of foreign law is best explained by the positivist idea of judicial law-making. Part V concludes. I will defend the claim that *foreign consensus is authoritative but is not law*, and that it *does not undermine legal positivism*. The ‘perfect storm’ – to use the same metaphor again – is just a light drizzle.

## II. Positive Law vs Positivism

The use of foreign law in constitutional reasoning<sup>9</sup> (hereafter: FLCR) is multi-faced, constantly changing and subject to thriving normative disagreement.<sup>10</sup> However, it is fairly easy to capture its essence: courts around the world use foreign law to decide complex issues – commonly, but not exclusively, in constitutional matters – where such use is neither mandatory, nor does the rule that is imported create direct legal consequences typical of valid domestic legal rules. Any further attempt to conceptualize FLCR in advance would beg the question, because the notions of ‘foreign law’, ‘mandatory use’, and ‘direct legal consequences’ are a part of the controversy. For example, can we define ‘foreign’ rules without relying on the very idea of a legal system that is under challenge? What makes the use of foreign law optional? Can there be a legal rule not producing consequences and what do they consist in? Let us for now set these questions aside in order to understand how Waldron’s position fits within the wider debate about FLCR.

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<sup>9</sup> The fact that the debate occurred in constitutional law does not exclude the possibility that the similar phenomena crop up in other areas of law.

<sup>10</sup> For an overview of normative concerns surrounding FLCR see Vlad F Perju, ‘The Puzzling Parameters of the Foreign Law Debate’ [2007] 1 *Utah Law Review* 167.

The debate has in recent years reached a standoff between the proponents and opponents of FLCR. Among the proponents, the dominant argument has been that foreign law only serves as a ‘persuasive authority’ and is not law.<sup>11</sup> It thus follows for them that there is nothing disconcerting about FLCR. In contrast, the opponents argue that foreign law acquires ‘authoritative legal weight’,<sup>12</sup> and that we have good reasons to feel uneasy about its use. Divergent self-descriptions of judges participating in FLCR can illuminate the margin between the two positions. Words of Laurie Ackermann, a former Justice of the South African Constitutional Court, are representative of the proponents’ view:

There seems to be the fear that in referring to foreign law one is bowing to foreign authority ... This is manifestly not so. One may be seeking information, guidance, stimulation, clarification, or even enlightenment, but never authority binding on one’s own decision.<sup>13</sup>

However, the critics disagree. The most prominent opponent of FLCR, Justice Antonin Scalia of the US Supreme Court, wants to resist precisely the assumption that foreign law does not attain the authoritative character. On Scalia’s understanding of things, the rhetoric used by justices who

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<sup>11</sup> On persuasive authority generally see Richard Bonaugh, ‘Persuasive Precedent’ in Laurence Goldstein (ed), *Precedent in Law* (Clarendon Press, 1987).

<sup>12</sup> Ernest A Young, ‘Foreign Law and the Denominator Problem’ (2006) 119 *Harvard Law Review* 148, 149.

<sup>13</sup> Laurie WH Ackermann, ‘Constitutional Comparativism in South Africa: A Response to Sir Basil Markesinis and Dr Jörg Fedtke’, in Basil Markesinis and Jörg Fedtke, *Judicial Recourse to Foreign Law: A New Source of Inspiration?* (Routledge, 2006) 263, 277. Justice O’Reagan from South Africa explained FLCR in the following manner: ‘The question of whether we will find assistance will depend on whether the jurisprudence considered is of itself valuable and persuasive. If it is, the courts and our law will benefit. If it is not, the courts will say so, and no harm will be done.’ *K v Minister of Safety and Security*, 2005 (9) BCLR 835 (CC), para 35. Similarly, former Chief Justice of the Israeli Supreme Court, Aharon Barak, expressed this view: ‘[...] comparative law acts as an experienced friend. Of course, there is no obligation to refer to comparative law. Additionally, even when comparative law is consulted, the final decision must always be local’, to which he adds that foreign law is ‘never binding’. Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2006) 198, 199. Some of the US Supreme Court justices support FLCR, and do not consider foreign law authoritative. Justice Stephen Breyer, for example, said: ‘I was taken rather by surprise, frankly, at the controversy that this matter has generated, because I thought it so obvious. You look around to what’s cited, what’s cited is what the lawyers tend to think is useful.’ US Association of Constitutional Law Discussion on the Relevance of Foreign Court Decisions, 13 January 2005, full transcript available at [www.freerepublic.com/focus/f-news/1352357/posts](http://www.freerepublic.com/focus/f-news/1352357/posts). (See also Stephen Breyer, ‘Keynote Address’ (2003) 97 *Proceedings of the Annual Meeting of the American Society of International Law* 265.) Justice Ruth Bader Ginsburg is of a similar opinion: ‘foreign opinions are not authoritative; they set no binding precedent for the US judge. But they can add to the store of knowledge relevant to the solution of trying questions.’ ‘“A Decent Respect to the Opinions of [Human] Kind”: The Value of a Comparative Perspective in Constitutional Adjudication’ (2005) 64(3) *Cambridge Law Journal* 575, 580.

cited foreign law should not blind us for the fact that judgments are sometimes reached on the basis of foreign law and not simply in concurrence with it. In his dissent in *Roper*, for example, he wrote:

Foreign sources ... are cited *to set aside* the centuries-old American practice ... The Court's parting attempt to downplay the significance of its extensive discussion of foreign law is unconvincing. "Acknowledgment" of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court's judgment* – which is surely what it parades as today.<sup>14</sup>

Hence, the proponents want to eschew the possibility that foreign law is binding, authoritative, or – in other words – the *law* for us; the opponents yearn to demonstrate that foreign law steadily acquires content-independent authority, amounting to and existing on a par with domestic law. As Fred Shauer puts it: 'the debate about foreign law is not a debate about citation. Instead, it is a debate about the rule of recognition [...]'.<sup>15</sup> So why does this normative issue take a detour and becomes attached to the question about the grounds and – by implication – the nature of law? It seems that the participants in the debate believe that the justification of FLCR supervenes on its status in legal reasoning. If the proponents can show that foreign law is not actually law, FLCR could be squared with the belief that the domestic law ought to prevail and democratic commitments are left intact. If the opponents are able to demonstrate that foreign law is treated in the same way as the domestic law, then further justifications for FLCR are needed as it empowers our and foreign judges more than we may be ready to accept.

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<sup>14</sup> *Roper* (n 6) 628 (Scalia dissenting). See also: Antonin Scalia, 'Foreign Legal Authority in the Federal Courts' (2004) 98 *Proceedings of the Annual Meeting of the American Society of International Law* 305, 309. Similarly, Judge Richard Posner argues: 'The problem is not learning from abroad; it is treating foreign judicial decisions as authorities in U.S. cases'. Richard Posner, 'No Thanks, We Already Have Our Own Laws' (2004) *Legal Affairs*, July-August, available at [www.legalaffairs.org/issues/July-August-2004/feature\\_posner\\_julaug04.msp](http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp).

<sup>15</sup> Fred Shauer, 'Authority and Authorities' (2008) 94 *Virginia Law Review* 1931, 1959. See also Vicki Jackson, 'Narratives of Federalism: Of Continuities and Comparative Constitutional Experience', (2001) 51 *Duke Law Journal* 223, 263.

In contrast, Waldron breaks away from the impasse by normatively defending FLCR, and at the same time arguing that *consensus in foreign law actually is the law for us*. This is his central thesis:

I want to argue that convergent currents of foreign statutes, foreign constitutional provisions, and foreign precedents sometimes add up to a body of law that has its own claim on us: the law of nations, or *ius gentium*, which applies to us simply as law, not as the law of any particular jurisdiction.<sup>16</sup>

The *leitmotif* of his theory is that all nations are partly governed by their own laws, but also partly by ‘laws common to all mankind’ (also called ‘*ius gentium*’),<sup>17</sup> associated with general principles of law on which most legal systems converge. Thus, instead of denying the legal character to foreign law like other supporters of FLCR, Waldron does exactly the opposite. Although idiosyncratic, this strategy is sophisticated and carries an evident normative promise – if one can show that foreign law is the law for us, the burden of normative disapproval rests equally with those who claim that such practice is inappropriate; after all, the first judicial duty is to apply the law. Although sceptical about positivism’s ability to explain *ius gentium*, Waldron does not deny the positive character to this body of law. As he argues, ‘saying that *ius gentium* is a body of positive law is not necessarily the same as submitting it to the demands of the legal ideology called *positivism*.’<sup>18</sup> So how does *positive law* undermine *positivism*? On the one hand, it challenges the separation between law and morality; on the other, it undermines the explanatory potential of the concept of a legal system.

### *The Grounds of Foreign Law*

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<sup>16</sup> Jeremy Waldron (n 7) 3.

<sup>17</sup> *Ibid*, 4.

<sup>18</sup> *Ibid*, 35.



In Ronald Dworkin's vocabulary, legal propositions are assertions about the content of law (eg Jones is legally obliged to pay Smith damages), while the grounds of law are considerations that make these assertions true (eg Jones is legally obliged to pay Smith damages *because of* the Consumer Protection Act).<sup>19</sup> There are two intertwined questions about the grounds of law. Firstly, what grounds make propositions of law true? For example, in *Roper v Simmons*, we may ask in virtue of what was the holding of the court legally true: 'The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed'.<sup>20</sup> More precisely, the question is what role does foreign law play in making this proposition true or false. Secondly, if foreign law matters for the truth of a legal proposition, we may further ask why is it relevant; or put differently, what made the foreign law a true ground of law?<sup>21</sup> We can, for example, query what the truth-maker for Scalia's assertion in *Roper* is: 'The foreign authorities ... do not even speak to the issue before us here'.<sup>22</sup> Crudely put, for a positivist, answers to both of these questions must eventually be attributed to social facts if courts are to be properly described as applying law. For a non-positivist of a Dworkinian provenance moral judgment is involved on both levels. Here, Waldron's account of *ius gentium* parts ways with positivism: moral values both make foreign consensus the law for us and furnish the way in which such consensus is applied.

As we have seen, Waldron argues that foreign consensus *is* our law, and it follows that it must have already been law before at least one case like *Roper* was decided. The validity of such law, however, depends on its value and not on social facts arising from the practice of law. The following remark is important:

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<sup>19</sup> Ronald Dworkin, *Law's Empire* (n 5) ch 1.

<sup>20</sup> *Roper* (n 6) 578.

<sup>21</sup> The second question becomes explicit in *Justice for Hedgehogs* (Harvard University Press, 2011) 400-15. See n 107.

<sup>22</sup> *Roper* (n 6) 624 (Scalia dissenting).

... reasons [of integrity and fairness] are sometimes so powerful in specific areas of law that they are best presented in the form of the relevant legal propositions' having a claim on us as law ...<sup>23</sup>

Now, 'best presented as having a claim' could be understood as a proposal for a law reform. To be more precise, it could be understood as a recommendation for reform of the *concept* of law, as an argument for philosophical tweaking with our understanding of law to make room for this additional body of norms. Waldron at times seems to be engaged in such enterprise: 'I shall argue that sometimes it *is* appropriate for our courts to make use of foreign legal materials. To support that argument I want to set out an understanding of law...' <sup>24</sup> But to accommodate the thesis that foreign consensus already is legally valid, Waldron needs to show that legal claims of foreign consensus were already true for us, while being aware that '[n]obody in Roper majority mentioned the law of nations', <sup>25</sup> that the interpretation he offers is not the 'implicit theory' justices relied on and that it might make them 'nervous'.<sup>26</sup> In order to do so, Waldron detaches legal validity from social facts and makes it partly dependent on moral reasons: 'The secondary rules in most legal systems don't operate as mere conventions ... They often embody substantive reasons...' <sup>27</sup> Waldron motivates his account of *ius gentium* by introducing these 'substantive reasons', which are objective moral reasons and not merely subjective motives that judges empirically happen to have, as truth-makers for the proposition that foreign law is our law. For Waldron, *de facto* normativity - the fact that people believe that law is normative - is 'trivial' and not up to the task of supplying a body of positive law with its normative force.<sup>28</sup> To make sense of *ius gentium* as law one needs to account for the moral reasons that support it and thus answer

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<sup>23</sup> Waldron (n 7) 4.

<sup>24</sup> *Ibid.*, 3.

<sup>25</sup> *Ibid.*, 26.

<sup>26</sup> *Ibid.*, 27.

<sup>27</sup> *Ibid.*, 55.

<sup>28</sup> *Ibid.*, 59.

‘[h]ow can “is” of a consensus become an “ought” for our judges?’<sup>29</sup> This plants the seed of normativity in Waldron’s concept of law.

To show the goodness of foreign consensus Waldron puts forward two arguments. The consensus is valuable because it presents the accumulated practical legal knowledge about issues that all jurisdictions face (the ‘learning’ argument), and because there is a global principle of integrity, which makes it unfair to treat similar cases differently in the world (the ‘fairness’ argument).<sup>30</sup> With these two moral reasons present, the consensus in foreign law ‘is of sufficiently enduring interest to be treated as a legal entity that can be considered or entertained apart from national practices that gave rise to it’.<sup>31</sup> In other words, moral worth makes this ‘legal entity’ transcend national legal practices.

Ius gentium is tied to its merits in yet another way. Because convergence between legal systems never amounts to a full consensus, Waldron provides a set of evaluative criteria to delineate which consensus counts and hence constitutes the law for us. In order to motivate the non-tautological normativity for such less-than-consensus, these evaluative criteria need to supply it with a moral force autonomous from moral reasons directly implicated in the case in which the foreign law is invoked.<sup>32</sup> Waldron thus argues that only the consensus among ‘civilized’ countries belongs to ius gentium. He unpacks the attribute ‘civilized’ by providing a set of qualities that legal systems must have to be included in the relevant consensus: they need to be free, democratic, broadly just, and respect the rule of law.<sup>33</sup> Again, while these criteria could provide sensible normative guidance for the use of foreign law, Waldron’s claim is that foreign consensus *is* law, and it follows that moral considerations figure among the existence conditions for such law: ius gentium is law so long as it does not fall short of stipulated evaluative benchmarks.

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<sup>29</sup> *Ibid.*, 59.

<sup>30</sup> *Ibid.*, chs 5–6.

<sup>31</sup> *Ibid.*, 60.

<sup>32</sup> *Ibid.*, 190.

<sup>33</sup> *Ibid.*, 194–200.

Finally – once the relevant set of facts has been identified – their application by courts is further curtailed by moral reasons. According to Waldron, there is an entanglement of moral and legal considerations in adjudication:

... the best set of tools for understanding the norms that *ius gentium* comprises are tools developed by the leading nonpositivist legal philosopher of modern times, Ronald Dworkin. I believe that *ius gentium* consists of a body of *principles*, discerned interpretatively from the commonalities that exist among the positive laws of various countries, by a legal sensibility that is both lawyerly and moralized.<sup>34</sup>

Following Dworkin, he believes that principles are not enacted, lack canonical expression, and instead of compelling a particular legal outcome have ‘weight’ which favours but does not necessitate a decision one way or the other.<sup>35</sup> They emanate from the actual practice of law but ‘the discernment of a principle in a given body of law is not possible without the exercise of moral judgment’.<sup>36</sup> Because of this ‘mix’ between socially embedded practice of law and moral reasons that give principles the dimension of weight, propositions of law are not true on purely social grounds.

Waldron could perhaps be understood to argue that the use of foreign consensus *should* depend on its merits. But his claim that *ius gentium* *is* our law does not sit well with this interpretation. Moreover, if the application of a body of law necessarily involves moral judgement, this certainly puts positivism under pressure. If the grounds of *ius gentium* are moral, positivism must deny either its legal character or its necessary dependence on moral value.

### *Foreign Law and Legal Systems*

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<sup>34</sup> *Ibid*, 35-6.

<sup>35</sup> *Ibid*, 62-3; Ronald Dworkin, *Taking Rights Seriously* (n 5) 22-8.

<sup>36</sup> Jeremy Waldron (n 7) 64.

The second reason for Waldron's doubts about positivism is the centrality of the concept of a legal system for the positivist account of law. Waldron associates legal positivism with 'legal relativism', understood as a thesis that 'something cannot be the law without being the law of some particular jurisdiction'.<sup>37</sup> Waldron suspects that this 'relativist' position is plausible:

... law's relativity is quite settled in many people's minds: it is part of the meaning of *law* to refer to a specific jurisdiction in this way ... If modern legal positivists are correct, law is in fact relative in a double sense: it is a law of a country because it applies to that country, and it is the law of a country because it was laid down or posited by that country's political institutions ... If this 'obvious' relativism is true as a matter of general jurisprudence, then we would expect something like the same sensitivity to the citation of foreign law in all countries.<sup>38</sup>

There are reasons to doubt Waldron's conclusion: if legal positivism so defined were true, the issue of foreign citation would be contingent and specific to each legal system, and thus more probably diverse rather than uniform in the whole world. But the thrust of his argument is elsewhere. Waldron maintains that legal claims of *ius gentium* need not depend on the institutions of a national legal system. *Ius gentium* applies to us – as he puts it – 'simply as law, and not as the law of any particular jurisdiction'.<sup>39</sup> The fact that domestic institutions did not 'posit' *ius gentium* does not affect its validity. While the persuasive part of the argument hints towards the possibility for a law to exist outside of a national legal system, the interesting question for positivism is whether it can exist outside of any legal system?

Maybe the problem could be overcome by clarifying the term 'posited'. Let me use an example. The Court of Justice of European Communities established the doctrine of direct effect, which

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<sup>37</sup> *Ibid*, 16. Waldron later acknowledges that this view may no longer be popular among positivists. *Ibid*, 54–5. Again, I shall analyse Waldron's argument as it stands because it poses interesting questions that positivism needs to answer.

<sup>38</sup> *Ibid*, 16–17.

<sup>39</sup> *Ibid*, 3.

enabled individuals to directly invoke EU law before both national and European courts.<sup>40</sup> According to this doctrine, EU legislation has a direct effect in, for example, the UK, although it was neither directly ‘posited’ by UK institutions nor could its legal validity be derived from the EU treaties that UK institutions had previously accepted. The positivist, it seems, must either claim that EU institutions are in fact UK’s institutions, or deny the direct effect of EU law. But the dilemma is false. Positing law may involve a rather passive stance on the part of the officials, as long as they engage with that law in some way.<sup>41</sup> If we take that the UK institutions accept or tolerate the doctrine of direct effect of EU directives, positivism can account for such phenomena, even if we grant the premise that the law can only occur in a national legal system. Analogously, while foreign law obviously does not originate in our legal system, our institutions can accept it and there is nothing in such acceptance that challenges the idea of a legal system. Waldron at one point supports a similar reading of *ius gentium*, and argues that in *Roper* the principle found in foreign law ‘became law in America only by virtue of the Supreme Court’s use of it’,<sup>42</sup> and that the decision to use foreign law ‘never left the hands of U.S. authorities’.<sup>43</sup>

Nonetheless, the notion that *ius gentium* is our law may still undercut the positivist doctrine that there cannot be law outside of a legal system. While contemporary positivism eschews the account of law based on the commands of a sovereign, it does associate it with a social practice of law. The sense in which *ius gentium* applies to legal systems in the world is therefore crucial, for if it operates without being engaged with by institutions, its property of being law is not owed to the rules they follow. Waldron’s challenge is important as it invites us to investigate on which level FLCR arises, which institutions are involved, and whether foreign consensus infiltrates legal systems by sidestepping their domestic rules of recognition. Here, the two limbs of Waldron’s disquiet about positivism meet. The question becomes: must the ultimate grounds of law be consumed by the facts made true by institutional practice within one legal system?

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<sup>40</sup> Case 26/62 *Van Gen en Loos* [1963] ECR 1.

<sup>41</sup> Leslie Green, ‘Legal Positivism’ in Stanford Encyclopedia of Philosophy, first published 3 January 2003, <http://plato.stanford.edu/entries/legal-positivism/>.

<sup>42</sup> Waldron (n 7) 73.

<sup>43</sup> *Ibid*, 169.

### III. Positivist Ontology and Foreign Law

It follows from what has been said that FLCR presents a challenge to positivism if foreign consensus is our law. Therefore, to deny this claim on the basis of the positivist conception of law would beg the question. To avoid this, the analysis will proceed in two steps. At this point, I will accept the claim that foreign consensus becomes our law in virtue of FLCR, and argue that positivism can account for it. In the next section, I will deny the truth of this claim; in so doing, I shall rely on an account of law which - while being in the neighbourhood of positivist tradition - could be embraced by a range of jurisprudential perspectives.

For these tasks to get off the ground, it is vital to ascribe some non-contestable content to legal positivism. Exclusive legal positivists - on Joseph Raz's formulation - believe that 'all law is source-based' so that 'its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument'.<sup>44</sup> Inclusive legal positivists - according to Jules Coleman - think that 'the existence of the criteria of legality in any community depends on social facts', but 'the criteria themselves need not state social facts'.<sup>45</sup> The underlying idea of both versions is that there must be no confusion between what the law is and what the law ought to be.<sup>46</sup> A common denominator is captured by the following slogan: 'the existence (and content, on exclusivist view) of law depends on social facts and not on its merits'.<sup>47</sup> Positivism thus asks two ontological questions about law: 'what is the mode of existence of law?' and 'what is the relationship between law's existence and morality?' The positivist slogan advances two theses in answering these questions: the 'social fact thesis' and the 'separation thesis'. Let us see how FLCR relates to these theses.

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<sup>44</sup> Joseph Raz (n 8) 210-11.

<sup>45</sup> Jules Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford University Press, 2003) 107.

<sup>46</sup> HLA Hart, 'Positivism and the Separation of Law and Morals' in *Essays in Jurisprudence and Philosophy* (Clarendon Press, 1983) 49-87.

<sup>47</sup> This is an appropriation of the definition by Leslie Green (n 41).

The social fact thesis defines the sense in which the law *exists*, and can be paraphrased as follows: ‘Law is a social fact’.<sup>48</sup> It implicitly distinguishes features of the world that exist independently of our minds (molecules, water or planets), and those that are mind-dependent (law, etiquette, language or money).<sup>49</sup> Positivist ontology aims to show that the reality of law is contingent on our social practices and is – in this respect – not different from other entities brought to existence by our social selves. Were there no human societies, there would be no law, but the natural features of the world would exist nonetheless.<sup>50</sup> Furthermore, there is nothing ‘transcendental’, ‘queer’ or ‘mysterious’ about social facts: the existence of law is not independent of our experience.<sup>51</sup> To make sense of such social facts one needs to rely on the idea of social rules, and corresponding beliefs, attitudes and behaviour of the participants in the practice that are cognizant of these rules.

Positivism ties together this shared understanding of rules through the idea of a legal system, which in turn becomes important in explaining law’s social ontology. Since Hart, it is widely accepted among positivist that there is a customary rule at the basis of a legal system – a rule of recognition – that stipulates the criteria for validity of all other rules and brings unity to the social practice of law.<sup>52</sup> The concept of a legal system also features in the explanation of law in another way: it distinguishes law from other social practices, because law, unlike etiquette or conventional

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<sup>48</sup> Hereafter, I rely on the most influential version of positivism, defended by HLA Hart and his heirs. It is worth noting that Kelsen thought that the basis of a legal system was transcendental (Hans Kelsen, *The Pure Theory of Law* (University of California Press, 1978) 201-5), and that some natural lawyers do not deny the social character of positive law (John Finnis, ‘On the Incoherence of Legal Positivism’ (2000) 75 *Notre Dame Law Review* 1597, 1601).

<sup>49</sup> For the distinction see John Searle, *The Construction of Social Reality* (The Free Press, 1995) ch 1. For ‘natural kind’ concepts see: Saul Kripke, *Naming and Necessity* (Blackwell, 1980), Hilary Putnam, ‘Meaning and Reference’ (1973) 70 *Journal of Philosophy* 699, and WVO Quine, ‘Natural Kinds’ in *Ontological Relativity and Other Essays* (Columbia University Press, 1969) ch 5.

<sup>50</sup> ‘Mind-independent existence’ here means that minds do not causally impose structure onto the world. See Richard Rorty ‘John Searle on Realism and Relativism’ in *Truth and Progress: Philosophical Papers* (Cambridge University Press, 1998).

<sup>51</sup> John L Mackie, *Ethics: Inventing Right and Wrong* (Pelican Books, 1977) 38-42.

<sup>52</sup> HLA Hart (n 2) 110.



morality for example, exists in the form of a legal system with institutions and officials. A positivist thus believes that legal validity - as the mode of law's existence - is attributed by a social rule followed by officials in a legal system.<sup>53</sup>

Correspondingly, there are two problems if one wants to discard the concept of a legal system in an attempt to account for FLCR. First, there is a danger of throwing the ontologically sound baby of social facts out with the bath water of legal systems. Of course, there can be social facts without a legal system, but the concept of a legal system offers an explanation of how there can be social facts in the context of law. In so doing, the concept of a legal system remains minimal: it comprises the rule of recognition and officials which follow it.<sup>54</sup> So even with the officials out of the equation, the existence of rules still needs to be established; if foreign law, *ius gentium* or any other body of law does not exist in the form of a legal system, it may be that their social reality is in question as well. Second, the concept of a legal system distinguishes between law and other social practices, and a philosophy of law that rejects it must explain the distinction in some other terms. Let me elaborate these points further.

Foreign law is without doubt a social fact. It would be ridiculous to claim, for example, that France has no positive law.<sup>55</sup> Moreover, social facts may occur in the world as a whole. Even though there may not be a 'world community',<sup>56</sup> it does not follow that global social facts have no foundation: while social facts presuppose the existence of social relations, they do not occur only in close-knit communities. Many social facts - international law, financial institutions, and fashion trends - exist globally. Furthermore, a conceptual possibility of the existence of global social facts should not be confused with the empirical claim about the actual existence of global consensus.

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<sup>53</sup> Raz conveys this succinctly: 'The existence of every law depends on the existence of the legal system to which it belongs, and the existence of legal systems depends on persistent and pervasive patterns of behaviour on the part of a large proportion of the population to which they apply.' Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of the Legal System* (Oxford University Press, 2<sup>nd</sup> ed, [1970] 1980) 150. See also Joseph Raz, *The Authority of Law* (Oxford University Press, 2<sup>nd</sup> ed, [1979] 2009) chs 5 and 6.

<sup>54</sup> HLA Hart (n 2) 116-17.

<sup>55</sup> On the perils of seeing law as a natural kind, see Dennis Patterson, 'Dworkin on the Semantics of Legal and Political Concepts' (2006) 26(3) *Oxford Journal of Legal Studies* 545.

<sup>56</sup> Justice Scalia sometimes talks about 'the so-called "world community"'. See *Atkins v Virginia* (2002) 536 US 304, 347 (Scalia dissenting). See also Scalia's dissent in *Roper* (n 6).

For example, in *Lawrence v Texas*, Justice Scalia not only denies that constitutional entitlements can ‘spring into existence’ because of foreign consensus,<sup>57</sup> but he also questions the reality of such consensus: because the consensus is only apparent, FLCR amounts to cherry-picking among the views of similarly inclined foreigners to justify the subjective moral preferences of justices.<sup>58</sup> It is indeed an illusion to speak about the consensus in the world if such consensus does not exist; and things that do not *exist* cannot *be* law. But this is easily accommodated within the positivist paradigm. On the one hand, a rule of recognition could stipulate that whenever there is a consensus in foreign law it is also the law in our system, and when there is no consensus, it is not our law. Numerous possibilities are plausible. The rule of recognition could state that the consensus between England, France and Germany constitutes the law in Italy, or that whatever is law in China is also the law in the US, and so on. On the other hand, if the consensus does not exist, then it is a misconception to think that the courts can rely on it in the first place.

Now, the controversy arises when it comes to explaining what makes these social facts relevant for us. But before I delve into that, let us see how the concept of a legal system, properly understood, is not an obstacle in accounting for FLCR and why there are compelling conceptual and empirical reasons to retain it. The concept of a legal system presupposes a shared understanding of the rule of recognition by *some officials* or institutions. However, it is neither assumed that these officials cannot act as officials of more than one system at the same time, nor that the legal system necessarily corresponds with the borders of the nation-state. Positivism could thus accommodate the claim that foreign consensus is our law in two ways. First, a number of courts in the world could share an understanding that the content of global legal consensus is a valid legal requirement and that they are adhering to a common rule of recognition, in addition to their domestic rules of recognition. Second, if we cannot make sense of the global legal system with the highest courts as participants in a shared practice, domestic legal systems may still be the

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<sup>57</sup> *Lawrence v Texas* (2003) 539 US 558, 598 (Scalia dissenting).

<sup>58</sup> ‘The Court’s discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta.’ *Ibid.*

appropriate explanatory framework for FLCR, with their rules of recognition incorporating foreign law as a legal source for their system only.

Notice that a social practice can have more or less features of a legal system and consequently be more or less law-like.<sup>59</sup> As other social phenomena, the law can also be in the process of change. For example, there could be law in a nascent form of a legal system with elements of convergent behaviour and attitude of acceptance of its rules by officials; there could also be officials adhering to a set of secondary rules of recognition with no settled hierarchical priority. Such rules are sometimes described as legal even if they do not belong to a fully developed legal system. Is FLCR a signal of an emerging global legal system? There is undeniably an embryonic transnational community of judges.<sup>60</sup> As Anne-Marie Slaughter notices, judges increasingly communicate with their peers and start seeing each other as partners in a common enterprise, rather than as guardians of their state's sovereignty. Interactions between courts consist in part of using foreign decisions as sites of engagement with and persuasion of each other. Some authors describe this process as legal 'socialization': through FLCR, courts negotiate, internalize, and finally institutionalize transnational norms of appropriate behaviour in domestic legal systems.<sup>61</sup> But a sense of a shared legal enterprise that would amount to a global legal system does not yet exist.

A comparison of FLCR with international and customary law can help in teasing the intuitions out. In paradigmatic cases of rule-creation in international law (eg ratification of an international treaty) there is an *intention* to create a rule with transnational validity, while in domestic law-making there are no such intentions. In this sense FLCR is similar to domestic law. When the US Supreme Court, for example, decides on the constitutionality of death penalty it does not intend to

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<sup>59</sup> HLA Hart (n 2) 3-4.

<sup>60</sup> Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 *University of Richmond Law Review* 99, 129-32.

<sup>61</sup> See: Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44(1) *Harvard International Law Journal* 191, and *A New World Order* (Princeton University Press, 2004) ch 2; Ryan Goodman, Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54 *Duke Law Journal* 621; Thomas Risse, Kathryn Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction' in Thomas Risse, Stephen C Ropp, Kathryn Sikkink (eds) *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999) 1.

create rules for South Africa or India, nor does the fact that it might actually achieve this affects its decision-making. This distinguishes FLCR from the cases in which transnational rule is deliberately created as such, but also from the cases in which transnational legal interactions gradually acquire horizontal effect under the auspices of an umbrella international system. For example, in the EU the conformity between legal systems is fostered by the existence of an overarching system, and rules may be applied with a view that they will affect similar application in other systems.<sup>62</sup> Such awareness of possible inter-systemic consequences is lacking in FLCR.

But intentions may not reveal the full picture about the nature of FLCR. Not all law is a consequence of law-making intentions. For example, in the case of customs, actors start behaving in a certain way and gradually start doing it for reasons of compliance with what they take to have become a legal norm. There is a gap between unison behaviour and rule-guided behaviour, and the moment in which the rule is accepted postdates intentions that had led to unison behaviour. We may, however, gain ex post facto insights into the nature of an earlier practice by focusing on the attitude of holding someone *accountable* for the rule-creation.<sup>63</sup> To a certain extent, accountability correlates to intentions. For even if we assume that the decision of the US Supreme Court that is used in, for instance, South Africa presents an application of a new transnational rule, there is little sense in taking the US Supreme Court to be responsible for its creation. Also, when references to consensus are made, it is not sensible to hold actors that participate in consensus accountable for creating the new law, because foreign consensus is not considered to be binding.<sup>64</sup> Compare this to international customs that obligate states without their consent. States have

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<sup>62</sup> For example, there is a general duty of 'harmonious interpretation' of national law in accordance with EU directives (Case 14/83 *Van Colson and Kamman v Land Nordrhein-Westfalen* [1984] ECR 1891). See more: Miguel Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing, 2003) 501, 527-9.

<sup>63</sup> Joseph Rouse, 'Social Practices and Normativity' (2007) 37 *Philosophy of the Social Sciences* 1.

<sup>64</sup> This might be understood as a part of general reluctance to attribute responsibility to amorphous actors such as the 'international community'. However, we do actually attribute responsibility to collective entities (states, corporations, etc.). Moreover, we can sensibly talk about the responsibility of 'international community' (e.g. to prevent genocide). Finally, any general objection to collective responsibility or intentions must also accept that similar concerns may be raised in the case of courts themselves, for they are collective bodies.

leeway to act as ‘persistent objectors’ and reject the validity of the custom in the making,<sup>65</sup> and they can be accountable for the existence of a new rule if they did not persistently object to it. This is possible because of a prior legal basis – a rule of recognition of sorts – attaching legal validity to international customs.<sup>66</sup> In the case of FLCR, we feel no need to establish a rule that would guarantee rights to persistent objectors in order to renounce their future obligations stemming from the global consensus; there is hence no worldwide rule of recognition validating it in a content independent manner.

While there is no global legal system, the idea of the domestic legal system is conceptually and empirically indispensable in order to make sense of FLRC. We are only able to speak of some law as ‘foreign’ precisely because we make the distinction between our legal system and other legal systems in the world. If it is true that all peoples use ‘partly their own laws and partly laws common to all mankind’ then there must be a distinction between the two bodies of law. Unless there is another idea against which the distinction is made intelligible, we have no reasons to reject the concept of a legal system. If, conversely, domestic law exists in the form of a legal system and some other law exists outside of any legal system, we then need to account for the ontology of the latter, for we have just seen that FLCR is not explicable in terms of a global legal system.

Finally, there are empirical reasons to trust that domestic legal systems are still the relevant framework for understanding FLCR. Even if there were a legal consensus in the world about a particular legal issue, there is not yet such a consensus regarding the way foreign law is used domestically. Empirical studies document significant variations in quantity, manner and effect of FLCR in national legal systems; for instance, judges in common law systems rely much more on other common law jurisdictions, civil law countries use foreign law once it is digested by academic

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<sup>65</sup> Curtis A Bradley and Mitu Gulati, ‘Withdrawing from International Custom’ (2010) 120 *The Yale Law Journal* 202, 233–241.

<sup>66</sup> Article 38(1)b of the Statute of the International Court of Justice.

commentary, transitional legal systems seek more guidance from abroad than the more established jurisdictions, etc.<sup>67</sup> These differences suggest that the issue is contingent on attitudes towards foreign law in legal systems themselves. Granted the assumption that foreign law is our law, it is much more probable that domestic rules or attitudes of domestic officials guide FLCR rather than anything else; or, counter-intuitively, legal officials in a legal system persistently fail to notice what their law really is. At one point, Waldron says: ‘social reality [of *ius gentium*] consists in the readiness of judges and jurists to refer to it and rely on it’.<sup>68</sup> This is correct, but then it follows that there is no unique body of law such as ‘*ius gentium*’ but many ‘*ius gentiums*’ for each legal system; if its reality depends on the readiness to use it then it cannot be the case that *ius gentium* applies to all legal systems equally.<sup>69</sup> If this is true, moreover, foreign law cannot actually be the law in systems that do not practice FLCR.

There is nothing in FLCR that undermines the social fact thesis. On the one hand, foreign law and consensus are social facts. If concerns are raised about the content of foreign law, or about the existence of global legal convergence, this is a matter of getting the social facts right or wrong (or presenting them correctly) but not of their mode of existence. On the other hand, we neither can nor should get rid of the idea of a legal system. It makes any explanation of FLCR conceptually possible, the empirics fit with the notion that national legal systems determine the use of foreign law, and – while positivism has no problems in accounting for a global rule of recognition – intuitions surrounding FLCR suggest that it is the domestic rules or attitudes of officials that make the foreign law relevant.

### *The Separation Thesis and Foreign Law*

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<sup>67</sup> One of the most detailed empirical studies on FLCR confirming this is Michal Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford University Press, 2013). Bobek reaches this conclusion: ‘The national supreme courts are doing nothing which could be said to burst positivistic national frameworks and signify, as sometimes announced, the dawn of national-based legal positivism.’ *Ibid*, 200. See also Christopher McCrudden, ‘Judicial Comparativism and Human Rights’ in Esin Örücu and David Nelken (eds), *Comparative Law: A Handbook* (Hart Publishing, 2007) 376.

<sup>68</sup> Waldron (n 7) 59.

<sup>69</sup> *Ibid*, 3.

The separation thesis aims to describe the relationship between the existence of law and its merits.<sup>70</sup> Inclusive legal positivists claim that the validity of law does not necessarily depend on its merits. Exclusive legal positivists contend that the validity of law necessarily does not depend on its merits.<sup>71</sup> The intuition that that the use of foreign law and morality are somehow intertwined is appealing and it calls for an explanation. Here it is useful to invoke John Gardner's distinction between merit-based tests of sources and source-based tests of merits: in the first case merit determines the validity of the source, and in the second the source introduces merit into the law.<sup>72</sup> If FLCR introduces merit-based tests of sources – in other words, if foreign law is our law and if its validity depends solely on its merits – neither of the positivist theses survives. Let us first examine some arguments in support of this option.

One argument could be that it would be better if foreign consensus were our law. But even if this is true, it does not follow that foreign consensus is our law: this would be a descriptive conclusion from a normative premise. Similarly motivated but a more plausible argument would be that we should treat foreign consensus as our law. This argument, however, would not presuppose that foreign consensus is already our law and would not undermine the separation thesis. Moreover, it is questionable whether a self-standing moral worth of foreign consensus could be established, because it is always an open question whether a social fact is good (although the question need not lend itself to an interesting answer, for some social facts are neither here nor there, it is still sensible to ask it). Waldron's notion that it is unfair to treat people differently in different jurisdictions is attractive, but its reach is limited. For consider: unless some moral substance is added to a rule that requires equal treatment, people can be treated equally bad. If this is so, then moral merit of foreign consensus cannot be established separately from moral reasons that

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<sup>70</sup> On its justification and interpretation see Leslie Green, 'Positivism and the Inseparability of Law and Morals' (2008) 83 *NYU Law Review* 1035, 1037-8.

<sup>71</sup> The lowest common denominator can be formulated as follows: 'Law can exist regardless of its merits', meaning that there are no necessary moral criteria for the existence of law. See Andrei Marmor, *Positive Law and Objective Values* (Oxford, Clarendon Press, 2001) 71.

<sup>72</sup> John Gardner, 'Legal Positivism: 5 1/2 Myths' (2001) 46 *American Journal of Jurisprudence* 199, 200-1.

constitute its merit, and we have no reason to rely on the consensus rather than on these reasons directly. One could argue that we ought to treat people equally in the case of epistemic uncertainty about moral requirements, once some moral threshold is reached. But if such uncertainty is connected to moral insignificance of the problem, justification of consistency is weak as well: there is no reason, for example, to establish a speed limit on German highways simply because there is such a limit in Poland, even though we may be uncertain about the best moral solution. Yet, if the issue is not insignificant, we ought not to be indifferent about it and there are no reasons to defer to the consensus without further moral backing.<sup>73</sup>

Another way to think about the relationship between foreign consensus and its merits is to say that foreign consensus is the law as long as the systems that constitute it are meritorious. Indeed, courts sometimes seek independent moral criteria to evaluate other legal systems when they engage in FLCR. For example, in *Thompson v Oklahoma*, Justice Stevens held that execution of minors under 16 years of age was unconstitutional and supported his conclusion by the opinion of ‘other nations that share our Anglo-American heritage, and by the leading members of the Western community’.<sup>74</sup> But when foreign consensus is relied upon, many systems within it do not satisfy these independent moral criteria. Actually, the force of the argument from consensus is often found in the lonely position that a country occupies in the world, and in the fact that even morally repugnant regimes take part in global consensus. For example, in *Roper* the court explicitly mentions that Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, Congo and China have stopped executing juveniles and unlike the US belong to a world consensus.<sup>75</sup> When it bears on the domestic law, foreign consensus does not necessarily imply a merit-based filter that separates non-meritorious systems out. Moreover, references to a partial consensus may be evaluative in nature but not make law depend on its merits. It is always a contingent matter which body of material is considered to be morally good, for judges can only act on their *belief* that something is

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<sup>73</sup> Waldron is aware of this problem and admits that the argument is ‘pretty modest’ and does not support the binding force of foreign precedent. Waldron (n 7) 141.

<sup>74</sup> (1988) 487 US 815, 830.

<sup>75</sup> *Roper* (n 6) 577.



morally meritorious or not. In *Bowers v Hardwick*, Chief Justice Burger referred to a tradition of prohibiting sodomy in the Western world in an attempt to rely on a consensus among countries that share similar values with the US, but he obviously failed to find the morally correct answer.<sup>76</sup> One could argue that judges did not get the morality right and thus missed to see what the law was, but – again – this neglects the fact that everyone in the legal system considered *Bowers* legal for seventeen years until it was overturned in *Lawrence v Texas*, when the Supreme Court concluded that ‘[i]t ought not to *remain* binding precedent’.<sup>77</sup>

Finally, can foreign consensus be applied without the exercise of moral judgement and is FLCR best understood in terms of ‘legal principles’? Positivism needs to accommodate or reject the claim that the force of foreign consensus is a function of its moral merits. One way to explain the relationship between foreign consensus as a social fact and moral merits would be to argue that principles are amalgams of social and moral facts. But this comes at a price of dubious ontology. It is difficult enough to divorce the existence of objective moral facts from contingent moral opinions and attitudes, and establish the vantage point from which such opinions and attitudes may be objectively evaluated; many believe that this presupposes the existence of entities which cannot fit within the scientific worldview.<sup>78</sup> (This is, of course, a challenge to both positivists and non-positivists who are moral realists, although a positivist need not endorse moral realism in virtue of being a positivist). But even if the challenge could be met and a plausible metaphysics of moral facts offered, it is not clear how these facts could interact with social facts to form a new mode of existence that then becomes twice as odd. As Alexander and Kress put it: ‘if moral norms are metaphysically “queer” ... legal principles are metaphysically superqueer.’<sup>79</sup> If the social fact thesis holds, it is possible for foreign law to be morally correct, but it is also possible that it is morally

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<sup>76</sup> (1986) 478 US 186, 196. (Burger, concurring).

<sup>77</sup> *Lawrence v Texas* (n 57) 578, emphasis added.

<sup>78</sup> John L Mackie (n 51) 38–42.

<sup>79</sup> Larry Alexander, Ken Kress, ‘Against Legal Principles’ (1997) 82 *Iowa Law Review* 739, 763, f. 96.

wrong; while it is at times difficult to make this judgement, it does not mean that there is a middle category of facts that are both social and non-social, dependent and independent of experience.<sup>80</sup>

The second way to explain the weight of foreign consensus would be to argue that it is not a merit-dependent source, but that FLCR functions as a source-based test for morality; in other words, that judicial beliefs about merits depend on foreign consensus. When Justice Kennedy mentions that the United Nations Convention on the Rights of the Child has been ratified by ‘every country in the world [...] save for the United States and Somalia’,<sup>81</sup> he may be saying that because the global community has moral authority, the specifics of its consensus are authoritative as well. This explanation better captures the role of FLCR in judicial reasoning. However, it must avoid circularity, for it is not possible for a source to exhaust moral merits. To paraphrase the dilemma Plato expounds in ‘Euthyphro’: is something morally good because the world community orders it, or does the world community order it because it is morally good?<sup>82</sup> If the former is true, then the source becomes all there is to goodness, which then cannot be a separate quality, and if the latter is correct, then the source is irrelevant. There is thus no non-circular reliance on moral authority of a source, if the source is taken to be constitutive of moral merits.

A non-circular explanation suggests that foreign consensus is not constitutive of moral merits but that the relationship is merely epistemic. FLCR is a way of gaining knowledge about the merits and foreign consensus operates as a *theoretical authority*: courts trust that they have reasons to believe that the convergence in foreign law points to moral truth.<sup>83</sup> The world community of courts and judges takes up a role of an expert, not only in moral merits as such, but also regarding

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<sup>80</sup> Even Ronald Dworkin now explicitly rejects this view: ‘We have now scrapped the old picture that counts law and morality as two separate systems and then seeks or denies, fruitlessly, interconnections between them. We have replaced this with a one-system picture: we now treat law as a part of political morality’. Ronald Dworkin (n 21) 405.

<sup>81</sup> *Roper* (n 6) 576.

<sup>82</sup> Plato’s Euthyphro is available at <http://classics.mit.edu/Plato/euthyphro.html>.

<sup>83</sup> On theoretical authority see Scott J Shapiro, ‘Authority’ in Jules Coleman, Scott Shapiro (eds), and Kenneth Einar Himma (associate ed), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) ch 10, 398–402.

the way morality plays out in the context of political and legal institutions.<sup>84</sup> There are several reasons to prefer this explanation, apart from the fact that it is not circular and does not run afoul of the fact/value distinction. First, FLCR is most commonly described as a process of ‘learning’, and this fits the picture of foreign law as theoretical authority.<sup>85</sup> Second, this understanding can account for the weight of global consensus as source-dependent and not merit-dependent (we have seen that the latter is either implausible or circular). There are many examples of weight being a function of the theoretical authority of a source. For example, I may have reasons to follow directives of both a general practitioner and a specialist in issues of health, but I have better reasons to follow the specialist if the issue falls into her area of expertise and therefore her directive has more weight; furthermore, the directive of the specialist may pre-empt the directive of the GP, but if they go in the same direction it is sensible to say that GP’s directive adds additional weight to the directive of the specialist. In the case of FLCR, we witness a similar process: the wider the consensus, the stronger the belief that there are reasons to take it seriously and the more weight it has in legal reasoning; moreover, such a belief can have ‘confirmatory’ weight for the conclusion already reached by the court itself as exemplified by *Roper*. Third, this also makes sense of the complaint that when judges comply with consensus, they defer to authority and not reasons. Because the consensus serves as a proxy for value, it exerts a pressure for compliance; nonetheless, this pressure is source-based and not merit-based, for if it constantly re-opens the issue of merits it is redundant. While the most obvious examples of governance on the basis of theoretical authority have religious origins, theoretical authorities are not unusual in modern legal systems:<sup>86</sup> deference to institutions that have better resources or expertise is quite common, and FLCR operates in a similar fashion.

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<sup>84</sup> Waldron himself offers a powerful reading of FLCR along these lines, but does not fully divorce the ontology of foreign law from its epistemic purchase. See Waldron (n 7) 76-108. See also Cass R Sunstein, *A Constitution of Many Minds: Why the Founding Document Doesn't Mean What It Meant Before* (Princeton University Press, 2009) 187-209.

<sup>85</sup> See n 13 and accompanying text.

<sup>86</sup> For different conceptions of authority of law see Arie Rosen ‘Two Logics of Authority in Modern Law’ (2014) 64(4) *University of Toronto Law Journal*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2331719](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2331719).

When FLCR is explained in these terms, foreign consensus takes a form of authority and does not undermine the separation thesis. For something to be a theoretical authority we must have independent reasons to believe that such authority is to be trusted. These reasons pertain to the merit of the source. To have a reason to follow doctor's directives, one needs to have a desire to be healthy and at the same time believe that the doctor is a trustworthy expert for the health issues. This judgement about the merits of foreign consensus is thus a *merit-based test of a source-based test of merits*. Although it seems like a conundrum, this feature of FLCR could be accommodated by both versions of positivism. For exclusive positivism, the authority of foreign consensus must be capable of pre-empting the reasons for action that we already have; because the consensus is not constitutive of merit, the merit of its directive is not identical to reasons for action, and hence the consensus is able to guide our behaviour without merely restating what we have reasons to do anyway.<sup>87</sup> An inclusive positivist could maintain that the merits of foreign consensus only come into play as a consequence of a social rule that makes merits relevant in the first place; in this scenario, each legal system would have a specific treatment of the issue – for example, there could be a provision of the constitution that uses moral language or a convention of interpretation allowing for FLCR, coupled with a power of the court to declare laws invalid.

Now, one could consider this explanation a Pyrrhic victory for positivism, for it comes at a price of merits being a condition for the use of foreign consensus. Even though these merits are of a different kind than the ones that bear on the issue at hand, and although there could be a legal system with a social rule that incorporates foreign consensus as law because it is meritorious, the assumption that foreign consensus is actually the law in all legal systems in the world should make the positivists uncomfortable. It would leave the possibility open for foreign consensus to be

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<sup>87</sup> Joseph Raz argues that theoretical authority cannot fully explain practical authority, for it points to the reasons that already apply to the agent (*Morality of Freedom* (Oxford University Press, 1986) 28–31). However, *fallible* theoretical authority such as foreign consensus can serve as a practical authority even on Raz's terms, because this leaves a conceptual space for the difference between objective reasons for action and reasons given by the authority. See also Scott J Shapiro, 'On Hart's Way Out' in Jules L Coleman (ed) *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (Oxford University Press, 2001) ch 5.

the law even in systems that do not practice FLCR, simply in virtue of its merits. Let me therefore turn to that question.

#### IV. Is Foreign Law the Law around Here?

The challenge against positivism succeeds only if the best explanation of FLCR shows that foreign law becomes the law for us. Notice that this conclusion cannot straightforwardly follow from the fact that the courts use foreign law, for *not everything that appears in judicial decisions is law*. Something that is not a norm of any kind – for example, evidence or scientific information – cannot be law. Nor is everything normative that has practical relevance for legal decision-making law: rules of grammar or mathematics are not law even though they are normative and applied by courts. Finally, not even every legal rule is incorporated into the legal system in virtue of its application by courts. It would be peculiar to describe a French rule applied in a conflict of laws case in Germany as a part of German law.<sup>88</sup> If this is true, we need a measurement that will show what falls below the threshold of law, even if the courts apply it.

To do this we cannot simply employ a positivist conception of law: that would assume the truth of positivism before it is defended. Besides, there is little agreement among the positivists beyond the social fact and separation thesis. According to positivism, a rule is legal if it is picked out as such by a rule of recognition used by officials in a legal system. What does it mean to be picked out by a rule of recognition as *law*? For instance, the courts rely on different social facts – such as the intentions of constitution-makers – but does that convert these intentions into legal rules? Hart mentions the following criterion to further distinguish legal from non-legal rules: legal requirements are marked by a high level of social pressure, can conflict with our internal motives and thus warrant the use of words ‘duty’ and ‘obligation’ to describe them.<sup>89</sup> Courts indeed do not use the language of duty or obligation when they refer to the requirements of foreign law, but the

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<sup>88</sup> Joseph Raz, *The Authority of Law* (n 53) 149, and *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press, 2009) 193–5.

<sup>89</sup> HLA Hart (n 2) 86–7.

criterion fails to cut the issue at joints: legal obligations sometimes do not carry such a heavy normative weight and moral obligations also fit the description.<sup>90</sup> Raz suggests that norms belonging to a legal system differ from those that are merely ‘adopted’ in the system because in the latter case the legal system either respects regulative powers of other communities or confers such powers on individuals.<sup>91</sup> It seems that this distinction is not helpful either, for the issue Raz tackles is different: FLCR falls in neither of these categories and does not concern the recognition or autonomy of other regulatory actors. To avoid these difficulties, let us analyse the status of foreign law in judicial reasoning and compare it to the ordinary understanding of law.

### *Law’s Features and Foreign Law*

What primarily distinguishes FLCR from the paradigmatic instances of law-application is its *selectivity*, as the use of foreign law differs from issue to issue. Let us again use Justice Scalia’s words from *Roper* to illustrate the point:

The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners’ views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decision making, but sophistry.<sup>92</sup>

One may agree or disagree with Scalia on how the cases *should be* argued, but his disapproval of the practice shows what the current status of foreign law in the Supreme Court’s jurisprudence *is*. Notice also that Scalia’s conclusion only follows if foreign law has the status and force of ordinary law. But this is not how FLCR operates, even in systems that are more receptive to foreign law. For example, South African Constitution states the following: ‘When interpreting the Bill of

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<sup>90</sup> For example, jaywalking in New York City is illegal but no one thinks there is a duty not to jaywalk, whereas there would be a strong moral duty supported by social pressure not to steal even if there were no law about it.

<sup>91</sup> Joseph Raz, *Practical Reason and Norms* (Oxford University Press, 1999) 153.

<sup>92</sup> *Roper* (n 6) 627 (Scalia, dissenting).

Rights, a court, tribunal or forum *must* promote the values that underlie an open and democratic society based on human dignity, equality and freedom; *must* consider international law; and *may* consider foreign law.<sup>93</sup> Moral values and international law obligatorily enter judicial reasoning, while foreign law is only facultative. The distinction is not tied to the effects of foreign law, but to the existence of judicial duty to consult it: to pun, the Constitution of South Africa suggests that foreign law is even less legal than morality. This is not how we think of law. It is not open for courts, for example, to consult the constitution in the case of death penalty but not in matters of free speech or abortion. In the case of FLCR, this is precisely what happens: foreign law is sometimes used and sometimes completely ignored.

One could protest that this simply confirms that foreign law is our law because - and only when - it is meritorious. But this argument is not available for two reasons. First, it does not respect the fact that FLCR is more *topic-dependent* than *merit-dependent*. While the demerit of foreign law may rule out FLCR, it does not follow that foreign law's merit is both a necessary and sufficient condition for FLCR: courts completely disregard consensus in foreign law on some issues, while on some other they consider them relevant.<sup>94</sup> Second, even a natural lawyer must account for the feature of legal norms that could be termed *prima facie authority* in legal reasoning. If there is a clash between the social-fact laws with moral precepts, we first need to find out what the positive law is, and then to notice the tension with morality. Natural law then denies the existence of immoral law as law, and positivists say that it is law but that we might have good moral reasons to disobey it. However, the burden of proof, and the analytic process we go through to determine this are the same. These stages of reasoning may look knotted together in practice, but the distinction holds because each legal decision must determine the relevant legal sources. The classical natural law slogan respects this insight and is hence formulated in the negative: 'Extreme

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<sup>93</sup> Article 39 of the Constitution of the Republic of South Africa (1996). Emphases added.

<sup>94</sup> See n 104 and accompanying text.

injustice is not law'.<sup>95</sup> Even Ronald Dworkin used to believe in the distinction between 'fit' and 'justification' in adjudication: the dimension of fit referred to the facts of political history whose best justification determined what the law is; and while the justification may have floated free from factual beliefs about it, political facts could not.<sup>96</sup> In contrast to all this, foreign law comes into the calculus in the process that Scalia and South African constitution recognize as 'selective' or 'facultative': we do not consider ourselves obliged to establish each time what the foreign law is, and then to subject it to the moral critique or find its best justification.

FLCR is also marked by a trait we can call *non-authenticity*. When foreign law is applied in international private law there is a considerable effort taken to discern what exactly foreign law is and how it operates in the system of origin. In FLCR, we sometimes witness a similar effort but very often we do not; courts typically use foreign law without attention to the intentions of foreign framers, detailed analysis of foreign precedents, or care about the systemic place of the foreign rule in its legal system of origin.<sup>97</sup> The critics of FLCR argue that courts are not equipped for doing comparative law research and that they regularly misinterpret foreign law.<sup>98</sup> This is probably a correct observation, but it presupposes that courts ought to treat foreign law as the law.<sup>99</sup> However, the courts themselves do not seem to be worried about the use of foreign law in a non-authentic manner, and mistakes in its interpretation are not considered to be too important. No other body of law is approached with a similar attitude.

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<sup>95</sup> Robert Alexy, 'On the Concept and the Nature of Law' (2008) 21 *Ratio Juris* 281, 282. Alexy talks about something being 'prima facie law' in this context. Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism* (Oxford, Clarendon Press, 2002) 42.

<sup>96</sup> See n 107 and accompanying text.

<sup>97</sup> For example, Chief Justice Burger argued in *Bowers v Hardwick* (n 76) 196 (Burger, concurring) that the history of Western Civilization had been consistent with laws criminalizing sodomy, but he omitted to notice that the European Court of Human Rights in *Dudgeon v United Kingdom* (1981) 4 EHRR 149 forbade such laws in Europe. Another example is the remark by Justice Scalia that European countries abolished death penalty to join the Council of Europe because this is 'a condition of obtaining the economic benefits of joining the European Union' (*Kansas v Marsh* (2006) 548 US 163, 187, footnote 3, Scalia, concurring); while all European countries have indeed either abolished death penalty or have a moratorium on its execution, not all of them did it to accede to the EU (eg Russia or Azerbaijan). See also Michael D Ramsey, 'International Materials and Domestic Rights: Reflections on *Atkins* and *Lawrence*' (2004) 98 *American Journal of International Law* 69, 77-9.

<sup>98</sup> Richard Posner (n 14).

<sup>99</sup> Courts should not rely on claims about foreign law which are not true, not because foreign law has the same authority as domestic law, but because they should generally be candid and diligent. This follows from the fact that it is not their general duty to invoke foreign law. For an argument that the courts should get the foreign law right once they rely on it, see Sarah H Cleveland, 'Our International Constitution' (2006) 31 *Yale Journal of International Law* 1, 97.



More importantly, legal systems provide for a possibility to react to misapplication of law through an *appeal*, and it is reasonable to expect that this institutional path would have been used so far had foreign law been our law. Thus, one way to distinguish between legal and non-legal materials is to inquire if one could base an appeal on it. But there are no examples of appellate courts treating the application of foreign law as a question of law, and there are even no attempts to appeal on the basis of the wrong application of foreign law. One could reply that FLCR does make foreign law our law, that we should hence be able to appeal it in the same way as any other point of law, and that the systems that do not provide for this option do not live up to the rule of law. This would somewhat counter-intuitively entail that all systems which practice FLCR fail to observe the rule of law. But these systems would first need to resolve a practical problem in order to make this appeal a real option, because *only the highest courts practice FLCR*.<sup>100</sup> While a defender of foreign law as law could maintain that there is no appeal because there is no one to appeal *to*, she would, by so doing, commit herself to an absurd thesis that most legal actors most of the time completely ignore a body of legal norms. Different courts may apply different sets of legal norms even within one legal system – for example, in federal systems – but this is a function of their jurisdiction and not of the source of law itself. It is not sensible to call a group of norms ‘legal’ if the bulk of legal practice operates without any notice of it.<sup>101</sup>

Finally, it is often argued that courts are learning something by looking at foreign law. Would it make sense to characterize FLCR as a process of learning the *law*? In common law systems it is up to the parties themselves to present the law to the court; although this may be a simplified view of the matter, it is striking that parties actually do not rely on foreign law in their pleadings and that FLCR is typically initiated either by an amicus brief or by the court itself. In civil law systems the *iura novit curia* principle applies, stipulating that the parties need not prove the law and that

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<sup>100</sup> There is little evidence that lower courts ever engage in FLCR. For some examples see Vicki C Jackson, ‘Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse’ (2004) 65 *Montana Law Review* 15.

<sup>101</sup> For hazards of building a theory of law on the basis of empirically insignificant phenomena see Brian Leiter, ‘Explaining Theoretical Disagreement’ (2009) 76 *University of Chicago Law Review* 1215.

judicial knowledge of the law is presupposed; it would be weird to describe the practice of FLCR as the process of ‘learning’, for the court already ‘knows’ the law. In both systems, moreover, there is no reason for any lawyer to disregard a body of law that is beneficial for her client, but a skilful lawyer would typically abstain from openly suggesting to the court to change the law:<sup>102</sup> if FLCR were a process of learning the law, lawyers would without doubt invoke foreign law much more often than they currently do.

### *Judicial Law-Making and Foreign Law*

To sum up, FLCR is best understood as a process of optional and selective use of foreign law by highest courts in a legal system, without possibility to appeal it or attention to its purpose or original intentions that is characteristic of ordinary application of law. While it does not fit our ordinary idea of law, it does fit our idea of *law-making*. Positivist account of law gives us the conceptual apparatus to articulate this insight and can explain some of the selectivity in FLCR. Because positivism is committed to the distinction between judicial law-making and law-applying – even if it is blurred in the practice<sup>103</sup> – it can account for the fact that courts disregard foreign law in the cases where the law is precise and use it when the law is more open to interpretation. Take an example. In certain areas US constitutional practice is different from the converging trends in comparative constitutional law, but foreign law is not used to change that: a case in point is the First Amendment that prohibits restrictions to the freedom of speech and demands neutrality of the state in religious matters.<sup>104</sup> In contrast, foreign law is used to interpret the Eighth Amendment that prohibits the ‘cruel and unusual’ punishment which is – according to the doctrinal test – to be interpreted in accordance with ‘the evolving standards of decency that mark

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<sup>102</sup> Phillip Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford University Press, 1982) 128-9.

<sup>103</sup> See Joseph Raz, *The Authority of Law* (n 53) ch 10.

<sup>104</sup> The case law also differs from current trends in other democratic states, partly because the text of the constitution is clear. For example, in the free speech context, defamation has been regulated differently from most European countries and other common law jurisdictions ever since *New York Times Co. v. Sullivan* (1964) 376 US 254. The US Supreme Court has denied any subsidies to private religious schools on the basis of the establishment clause in *Zelman v. Simmons-Harris* (2002) 536 US 639, while in even in France (committed to a strict separation between state and church) such schools receive state funding. For examples see Vicki C Jackson (n 7) 163.

the progress of a maturing society'.<sup>105</sup> For a positivist, the fact that foreign law is used in the latter and not in the former context is not surprising. While positivism is neither committed to the thesis that courts are only motivated by a concern for authentic application of law, nor to the claim that they should be,<sup>106</sup> it can give sense to the fact that FLCR correlates to judicial discretion: the clarity of the existing positive law is a considerable obstacle for courts to change it. If law is a function of moral interpretation all the way down, the difference in FLCR between the First and Eight Amendment is puzzling. If we have reasons to believe that the consensus in foreign law got the morality right, and if all positive law is just a political fact that is taken into account solely because it has some moral relevance, then why is the world consensus not invoked and followed in each case?<sup>107</sup>

Positivism can also make intelligible the fact that only the highest courts engage in FLCR. It is one of the hallmarks of positivism to draw attention to the fact that courts in all systems have limited law-making powers.<sup>108</sup> Since judiciary is hierarchically organized, the courts of last instance typically and most openly exercise this power; given the fact that their decision can be reversed or remanded, lower courts have a strong motive to abstain from changing or adding to the existing law. Because of this, it is expectable that only higher courts would practice FLCR. Furthermore, judicial willingness to modify law depends on their factual legitimacy to do so: it is then understandable that higher courts more openly develop the law through FLCR for their law-making powers are typically more accepted. This insight accounts for some comparative variance in FLCR as well. In common law systems, courts are traditionally acknowledged as law-making institutions; in contrast, in civil law systems this is not the case although there is probably as

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<sup>105</sup> *Trop v Dulles* (1958) 356 US 86, 101.

<sup>106</sup> John Gardner (n 72) 213-4.

<sup>107</sup> Following Dworkin's restatement of the distinction between fit and justification in *Justice for Hedgehogs* (n 80), one could argue that there is value in following clear and democratic law in contrast to the situation when the law itself leaves it for the judges to develop it, and that this explains the difference between the two cases. But – given the disagreement about morality – any decision could be justified and ex post facto explained in terms of this theory. If the courts follow the existing law it is because of democracy and consistency, and if they change it is because was bad. Moreover, if the law is clear but morally wrong then the theory cannot explain why the consensus is not followed. We have no reason to prefer this explanation to a much more simpler one that respects the fact that judges do understand sources of law as pre-interpretatively given.

<sup>108</sup> HLA Hart (n 2) ch 7.

much judicial law-making. If we compare common law and civil law systems that are similar in other respects – such as England and France – we see that the English courts readily cite foreign law and the French almost never.<sup>109</sup> Likewise, in systems where the courts are accepted as vehicles of social change and hence law-making, such as South Africa, courts are more likely to be empowered and actually use foreign law.

Let me finish with some remarks about the nature and scope of law-making in the context of FLCR.<sup>110</sup> Notice that such law-making can occur on two levels. First, the courts can use foreign law to make a substantive change in the legal situation of the parties to the case or even to alter the general rule that applies to all analogous situations. For example, if the law allowed the execution of minors and prohibited consensual sodomy, the court can use the foreign law to prohibit the execution of minors and allow consensual sodomy. The effects of this law-making can pertain only to the pending case or also to an unknown number of future situations that will be governed by the new rule. While the details will depend on whether the decision is accepted as a precedent and relied upon by subsequent judges, in both cases the law has been changed; in the former case only for the specific individual concerned, and in the latter for a number of currently indeterminate individuals as well. Second, a more controversial law-making through FLCR could affect the rule of recognition itself: it would encompass a change in what counts as a source of law. In this case, foreign law would attain the status of a source of law to be applied in much the same way as the traditional ones, such as constitution, international treaty, legislation or precedent. The substantive effects of foreign law as a legal source would then vary over time as its content varies; for instance, the question whether executing juveniles or consensual sodomy are lawful would be determined by the consensus in foreign law at any given moment. While legal sources do apply in specific ways, I argued here that a transformation of the rule of recognition has not yet occurred when it comes to foreign law.

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<sup>109</sup> Christopher McCrudden (n 67) 377; Michal Bobek (n 67) chapters 5 and 6.

<sup>110</sup> I am grateful to the anonymous reviewer for pushing me to clarify this point.

The question then is: how do we know that the rule of recognition has evolved? This issue is too complex to be resolved here in general, but pondering the status of foreign law may have brought us a bit closer to the answer. Foreign law lacks certain features of ordinary legal sources which could signal that the rule of recognition has changed. First, its *status* in legal reasoning is different. Legal sources are characterized by non-selectivity, topic-independence, prima facie authority and authenticity. Once there is a prolonged iterative practice of reference to foreign law, which is indiscriminate, independent from subject matter, non-optional and sufficiently attentive to the details of foreign law, it will be sensible to say that foreign law has acquired legal validity. Second, the *institutional* dimension of the application of foreign law is different from ordinary law. To become law, foreign law would have to be appealable, and used by a range of courts and other institutional actors in a legal system. If it is not possible to claim misapplication of foreign law before a higher court and if the practice of reference to foreign law is not widely spread in the institutional system, the rule of recognition has not evolved.

## V. A Cosmopolitan Positivism?

The aim of this article was descriptive: to show that legal positivism is not undermined by the use of foreign law and to account for its place in contemporary legal systems. I argued that foreign law does not become our law in virtue of its use by courts, and that, even if it did, positivism could account for it. In explaining FLCR, it is sensible to retain a distinction - familiar to all lawyers - between the sources of law and their interpretation. FLCR may become one of the customary ways in which interpretation is done, but it does not follow that foreign law *itself* becomes our law. The rule of recognition - the master social rule that makes all other rules a part of our legal system - does not come in the form of a cooking recipe. Recipes identify the ingredients first and then explain what to do with them. In legal practice, these two steps may seem to be blended. It does not mean, however, that we need not know our ingredients first, the legal sources which we interpret, and that everything that is used in interpretation becomes law. Even if conventions of

interpretation allow for the use of foreign law, it lacks certain features that we commonly ascribe to law. Finally – it bears repeating – it is empirically and conceptually possible for foreign law to become legally valid for us in the future. The rules of recognition can change over time and positivism has no objection to this possibility provided that such circumstances obtain.

I argued that foreign legal consensus is best understood as a facultative theoretical authority. Whether this authority is legitimate is a question that must wait for another occasion. But I should perhaps briefly address the following one – is legal positivism a culprit for the opposition to the use of foreign law? Understanding foreign law only as a source of interpretation and not as our law could seem unattractive for it might make it harder for courts to use foreign law, which may otherwise be a sensible strategy for any careful lawmaker. Positivism as such has no stakes in the normative debate about the use of foreign law. Joseph Raz once described positivism as the ‘enterprise of demythologizing the law, and of instilling rational critical attitudes to it’.<sup>111</sup> In particular, he saw a danger in perpetuating the ‘moralizing myth’ which neglects that the connection with moral values is ‘precarious’.<sup>112</sup> I dare not say whether this view is popular among positivists, but to accuse positivism of being a culprit is to uphold the myth. The question is both whether one should blame positivism for exposing the truth, and whether breeding the illusion could change it. On the one hand, the illusion entails a fallacious inference from ‘ought’ to ‘is’: it might be good if foreign consensus were our law but that does not tell us what the law actually is. On the other, positivism would not banish FLCR from our constitutional practice, for it does not deny that interpretation can be morally charged.<sup>113</sup> It is not incoherent for a positivist to support FLCR, but on non-controversial grounds: there is no reason to prefer a detour moral argument that aspires to change our conception of law to a straightforward demonstration of the value of FLCR coupled with a descriptively correct insight that judges do make law.

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<sup>111</sup> Joseph Raz (n 8) 211.

<sup>112</sup> *Ibid.*

<sup>113</sup> Joseph Raz, for example, believes that ‘[f]ormal legal doctrines ... should not be used to stop the courts from resorting to moral considerations to develop and improve the law.’ Joseph Raz (n 88) 369–70.